

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

25160

FILE: B-209929

DATE: May 17, 1983

MATTER OF: IFR, Inc.

DIGEST:

1. Contrary to the protester's belief, there is no evidence that the agency's contracting personnel were biased against contracting out since solicitation was not issued for purposes of a cost comparison under OMB circular No. A-76 and, after a resolicitation, a contract was in fact awarded.
2. Government estimate will not be questioned where the contracting agency has submitted detailed supporting evidence which provides a reasonable basis for the estimate.
3. Contracting officer did not abuse her discretion when she concluded that the sole bid received--approximately 24 percent higher than the Government estimate--was unreasonable and that this provided a compelling reason to cancel the invitation and resolicit.
4. GAO has no authority under the Freedom of Information Act to determine what information must be disclosed by Government agencies; the protester has to pursue its disclosure remedy under the procedures provided by the act.
5. Protester did not meet its burden of proof when it claimed that the contracting agency had acted in bad faith. To support a finding of bad faith, the record must show by irrefutable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. No such showing has been made here.

IFR, Inc. (IFR), protests the cancellation of invitation for bids (IFB) No. DAKF10-82-B-0265 issued by the Department of the Army (Army), Fort Stewart, Georgia.

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We deny the protest.

The IFB solicited bids for the operation, maintenance, and repair of the new Fort Stewart Composite Health Facility. Twenty-three firms were solicited, but only IFR submitted a bid. IFR's bid price was \$2,880,000. The Government estimate was \$2,316,304. In the Army's opinion, IFR's price was unreasonable and the solicitation was canceled.

After cancellation, the Army contacted the other firms which had been sent bid packages to learn why they had not competed and found that the other companies considered themselves to be primarily custodial contractors and felt the Fort Stewart job involved too much mechanical work. In light of this information, the Army developed a new list of potential bidders containing companies more capable of performing all the required work. The Army advises that upon resolicitation, 16 bids were received and award has been made to the E.C. Corporation for approximately \$1.5 million less than IFR's original bid price.

IFR argues that its bid price was reasonable and that the Army should not have canceled the solicitation. In IFR's opinion, the Army's contracting personnel are biased against contracting the work out and are doing their best to see that the work is done in-house by Government personnel. In this connection, IFR contends that the Government estimate is unreasonable and complains that the Army has refused to release the details of its estimate despite a request under the Freedom of Information Act (FOIA).

In support of its contention that its bid price is reasonable, IFR has presented figures which show that IFR's price per square foot (\$2.87) is considerably lower than the price per square foot for similar services at both civilian and military hospitals across the country (prices range from \$3.47 to \$4.97 per square foot according to IFR). As to the Fort Stewart price per square foot (\$2.25), IFR argues that it is too low and demonstrates that the Government estimate is unrealistic.

Finally, IFR maintains that the Army has acted in bad faith throughout the procurement process because of the Army's refusal to accept an offer by the Small Business Administration (SBA) to provide data to support the reasonableness of IFR's bid price. In addition, IFR contends that the Army contracting personnel intentionally misinformed congressional staff members to hide the fact that they had decided not to contract the work out.

At the outset, the Army states that it intended from the first to contract this requirement out and, contrary to IFR's apparent belief, this procurement was not conducted for purposes of a cost comparison under Office of Management and Budget (OMB) circular No. A-76.

Regarding the Government estimate, the Army argues that it was developed using Department of Labor wage rates, staffing data derived from organizational guides published by other military hospitals, and data for material costs developed as an actual ratio of materials to labor costs for current annual maintenance and repair costs of utilities at Fort Stewart. The Army states that it considered using national and regional statistics and actual costs of local facilities as IFR suggests, but concludes that too many variables are present from hospital to hospital to rely on those figures.

As to IFR's use of a comparison of cost per square foot for the operation and maintenance of hospital facilities, the Army argues that these figures are misleading. According to the Army, this comparison is not accurate since a hospital's operation and maintenance costs are not necessarily dictated by the size of the hospital--that is, a 10,000-square-foot hospital may require the same costs, personnel, and equipment for operation and maintenance as a hospital twice as large, but the cost per square foot for the smaller hospital would be twice that of the larger one. Nevertheless, the Army notes that similar contract for a new hospital at Fort Campbell, Kentucky, has a cost of \$2.11 per square foot while the Government estimate for the Fort Stewart contract is \$2.09 for the first year and an average of \$2.24 for the projected 3-year life of the contract. Thus, the Army indicates that, even under IFR's cost-per-square-foot method, the Government estimate is realistic.

Based on the foregoing, the Army concludes that the Government estimate was prepared in a fair and reasonable manner using sound business judgment and is, therefore, a realistic projection of the costs of operating and maintaining the new facility.

Having concluded that the Government estimate was reasonable, the Army next argues that IFR's bid price was properly determined to be unreasonable. The contracting officer states that due to the wide variance between IFR's bid price and the Government estimates, as well as the lack of competition, shortly after bid opening she requested that the Government estimate be reviewed and that she be provided a copy of the detailed estimate so that she could make a determination whether IFR's price was reasonable. After

receipt of the detailed estimate and after she had corrected some computation errors (which resulted in an increase in the Government estimate), the contracting officer determined that IFR's bid price--approximately 24 percent higher than the Government estimate--was unreasonable and that the IFB should be canceled. In the Army's opinion, the contracting officer's decision was a proper exercise of her administrative discretion.

The record indicates that the decision not to release the detailed Government estimate to IFR was based on the belief that, because of the resolicitation, this information could provide IFR with an unfair competitive advantage. However, the Army now informs us that it is now willing to release this information since the resolicitation has been completed and an award has been made.

Finally, the Army denies that there has been any bad faith on its part. It states that the contracting officer refused the SBA offer to help determine the reasonableness of IFR's bid price because she believed that she already had sufficient information from the Government estimate to make this determination without SBA's aid. As to IFR's charge that contracting personnel intentionally misinformed congressional staff members about the status of the procurement, the Army denies this and has provided copies of internal memoranda which show that, prior to the decision to cancel and resolicit, all those who made inquiries were told that IFR's bid was being reviewed to determine its reasonableness and, after the decision to cancel and resolicit had been made, anyone who requested a status report was told that IFR's bid had been found to be unreasonable and the solicitation had been canceled. In the Army's opinion, it never tried to hide anything or misconstrue the facts, but was always frank and direct with anyone who was interested in the case.

Contrary to IFR's belief, there is no evidence that the agency's contracting personnel were biased against contracting out or that they were conspiring to keep performance in-house. There is no indication that the IFB was issued for the purpose of other than contracting the work out.

As to the question of whether the Government estimate was reasonable, we have held that our Office will not question a Government estimate where the contracting agency has submitted detailed supporting evidence which provides a reasonable basis for the estimate. Lashcon, Inc., B-201833, June 9, 1981, 81-1 CPD 469.

Here, the Army has submitted a copy of its detailed Government estimate which sets out the different elements the Army used to develop its total estimate. Moreover, the Army has explained at length why it used this particular approach rather than IFR's cost-per-square-foot method. In our opinion, this evidence provides a reasonable basis for the estimate and, therefore, under the above-mentioned rule, our Office has no basis to question the reasonableness of the Army's estimate.

Regarding the cancellation of an IFB, we have held that, because of the potential adverse impact on the competitive bidding system, a contracting officer's decision to cancel an invitation after bid opening must be supported by a compelling reason. Marmac Industries, Inc., B-203377.5, January 8, 1982, 82-1 CPD 22. The regulations provided that such a reason exists where the contracting officer determines that the prices received are unreasonable. Defense Acquisition Regulation § 2-404.1(b)(vi) (1976 ed.). The determination of whether such a reason exists in a particular case is a matter primarily within the discretion of the contracting agency and, thus, will not be disturbed by our Office absent clear proof of abuse of discretion. Ramsey Canyon Enterprises, B-204576, March 15, 1982, 82-1 CPD 237. A determination that a bid price is unreasonable may be based upon a Government estimate, past procurement history, or any other relevant factors. Lashcon, Inc., supra.

In view of our conclusion regarding the reasonableness of the Government estimate, we find no basis to question the contracting officer's use of this estimate to determine the reasonableness of IFR's bid price. As the Army points out in its administrative report, we have held that a bid only 7.2 percent above the Government estimate was properly rejected as unreasonable. Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233. Therefore, in our opinion, the contracting officer did not abuse her discretion when she concluded that IFR's bid price--approximately 24 percent higher than the Government estimate--was unreasonable and that this provided a compelling reason to cancel the IFB and resolicit.

In regard to IFR's complaint against the Army's refusal to release the detailed Government estimate, we note that our Office has no authority under the FOIA to determine what information must be disclosed by Government agencies. While information in an agency report which the agency believes is exempt from disclosure under the statute will be considered by our Office in reaching a decision on the merits of the

protest, we will not disclose it outside the Government. The protester's recourse in such situations is to pursue its disclosure remedy under the procedures provided by the act. Claude E. Atkins Enterprises, Inc., B-205129, June 8, 1982, 82-1 CPD 553.

IFR's last ground of protest is that the Army acted in bad faith in evaluating the IFR bid and this bad faith was manifested by the Army's refusal to accept SBA's offer of aid in determining the reasonableness of IFR's bid price and the agency's intentional misinforming of congressional staff members as to the status of the procurement. We have held that, to support a finding of bad faith, the record must show by irrefutable proof that the agency had a malicious specific intent to injure the party alleging bad faith. Allied Sales and Engineering, Inc., B-203913, B-204102, January 8, 1982, 82-1 CPD 23. In our opinion, IFR has not met this burden of proof. IFR has offered general, unsupported allegations regarding the actions and motives of the Army's contracting personnel. The Army, in turn, has denied these charges and has presented documents which show that its contracting personnel treated IFR fairly and did not intentionally misinform anyone about the status of the procurement. Consequently, under the evidence presented, we find no basis to conclude that the Army acted in bad faith, and this ground for protest therefore is without merit.

Protest denied.

for Milton J. Arnold
Comptroller General
of the United States